Muhammad Zamri Vinoth bin Kalimuthu v Arumugam a/l Dorasamy

HIGH COURT (KUALA LUMPUR) — WRIT SUMMONS NO WA-23CY-46–10 OF 2020
MOHD NAZLAN J
7 MAY 2021

Civil Procedure — Striking out — Counterclaim — Defendant and another person filed counterclaim against plaintiff in defamation suit — Whether counterclaim disclosed reasonable cause of action — Whether counterclaim vexatious, scandalous and an abuse of process — Whether introduction of the second plaintiff in the counterclaim was irregular as it was made without leave of court — Rules of Court 2012 O 15 r 3

Civil Procedure — Parties — Joinder of parties — Second plaintiff in the counterclaim was not a defendant in the main suit — Whether introduction of the second plaintiff in the counterclaim was irregular as it was made without leave of court — Whether the conditions for joinder of parties were fulfilled — Rules of Court 2012 O 15 rr 3, 4 & 6

This was an application by the plaintiff to strike out a counterclaim instituted by the defendant (as the first plaintiff in the counterclaim) and another person as the second plaintiff in the counterclaim who was not a defendant in the main claim. The plaintiff had commenced a defamation suit against the defendant in response to a number of postings made by the latter on his Facebook page. The defendant, who claimed that the plaintiff had subsequently himself made a number of defamatory statements concerning, among others, the defendant in the plaintiff's own Facebook account, also included a counterclaim against the plaintiff in the amended defence. The counterclaim, however, was not only instituted by the defendant as the first plaintiff against the plaintiff in the main claim, but also by a second plaintiff, a lawyer-activist. The latter alleged that in one of the plaintiff's alleged defamatory statements against the defendant (first plaintiff in counterclaim), the plaintiff had also libeled the second plaintiff. The plaintiff then applied to strike out the counterclaim under O 18 r 19(1)(a), (1)(b) and (1)(d) of the Rules of Court 2012 ('the RC 2012'). The plaintiff argued that: (a) the introduction of the second plaintiff in the counterclaim was defective and irregular as it was made without leave of the court and without sufficient particularisation of the relevance of her involvement in the dispute between the plaintiff and the defendant hence the second plaintiff in the counterclaim did not have locus in the proceedings; and (b) the plaintiff's right to answer the second plaintiff's counterclaim was restricted as he was not able

to enter his appearance to the counterclaim since no endorsement in the requisite Form 14 had been filed and served by the second plaintiff in the counterclaim on the plaintiff despite the requirement of O 15 r 3 of the RC 2012. The issues that arose for determination was: (a) whether the counterclaim disclosed a reasonable cause of action; (b) whether the counterclaim was vexatious, scandalous and an abuse of process; (c) whether the second plaintiff could be included in the counterclaim; (d) whether there was an infringement of O 15 r 3 of the RC 2012; (e) whether O 15 r 4 of the RC 2012 was applicable; and (f) whether O 15 r 6 of the RC 2012 was relevant.

Held, dismissing the application with costs:

(1) A scrutiny of the pleadings in the counterclaim in this case could not but readily disclose the existence of a reasonable cause of action. In order to establish a cause of action in defamation, the three elements that the defendant, as the plaintiff in the counterclaim must be able to show on the face of his pleadings are that first, a specification of a statement bearing defamatory imputations; secondly, the identification of the defendant in the statement or that the same reflects on his reputation; and thirdly, the publication of the statement to any third person by the plaintiff. Having regard to the entirety of the pleadings and particularly the plaintiff's first statement and the plaintiff's second statement, the learned judge found that these elements constituting the cause of action in defamation had been disclosed on the face of the pleadings in the counterclaim. Whether the defendant who bore the burden of proof had and could adduce sufficient evidence to prove each and every of the said elements to establish the cause of action was not the concern of the court at this stage (see paras 36–37).

(2) In the claim, the plaintiff sought the reliefs of primarily injunction and damages, whilst in the counterclaim, the defendant prayed mainly for injunction and an apology. Again, given the context it could not be said what the defendant was seeking was frivolous, vexatious, or abusive of the process. Further, the plaintiff in his defence to the counterclaim had pleaded that the plaintiff's first statement and the plaintiff's second statement were statements of truth. It was for the parties to adduce evidence to convince the court in a full trial, for such issues would at this stage only generate conflicting affidavit evidence, what more considering the underlying subject matter, making the existence of triable issues demonstrably manifest, thus rendering summary dismissal of the counterclaim plainly unsuited and wholly unjustified. It also could not be emphasised enough that every Malaysian citizen had a constitutional right of access to justice under art 5(1) of our Federal Constitution and the effect of striking out a pleading was to completely deprive a plaintiff from having his day in court (see paras 40–41).

(3) It was not difficult to appreciate that O 15 r 3 did not apply to the facts in the instant case. The provision concerned a defendant in a main action who wished to file a counterclaim against the plaintiff and another person who was not already a party. In the instant case the defendant was not suing by way of counterclaim any other party in addition to the plaintiff. In fact, here, there was another person who was not already a party in the main claim between the plaintiff and the defendant who wished to be a party in the counterclaim against the plaintiff. This party, Siti Zabedah Kasim was the second plaintiff in the counterclaim against the plaintiff (as the defendant), and the defendant was the first plaintiff in the counterclaim (see para 48).

(4) The essence of the complaint of the plaintiff in respect of O 15 r 3 was his inability to enter appearance to the counterclaim as no endorsement had been served by the second plaintiff on him. But this was patently misconceived, for there was no requirement for any endorsement be served by the second plaintiff nor in response thereto, any appearance by the plaintiff. In this case the plaintiff initiated the main claim and it was the defendant who had to enter appearance and defend the action. This the defendant has performed under Or 12 of the RC 2012. In the counterclaim where their roles were reversed, and the plaintiff became the defendant, there was however no necessity for the plaintiff (as defendant) to enter appearance. By initiating the suit, the plaintiff had already submitted himself to the jurisdiction of the court and it is assumed that he would defend any counterclaim filed against him by the defendant. And indeed he had. If he had wished not to contest the counterclaim, he could have easily not filed his defence statement (see paras 50 & 53).

(5) A further and substantive basis which provides validity to the counterclaim filed by the second plaintiff who in this case joins the proceedings only at that stage in a counterclaim, not as a defendant as contemplated in O 15 r 3 but instead as a plaintiff is the provisions of O 15 r 4 on joinder of parties. On the facts of the instant case, it was difficult to argue against the existence of some common question of law or fact in terms envisaged under sub-para (1)(a) of O 15 r 4 or that the rights to relief by the plaintiffs in the counterclaim arise out of the same transaction as contemplated under sub-para (1)(b). After all, the crux of the matter in respect of the counterclaim is that there were two allegedly offending statements made by the plaintiff. The defendant took objection to both the plaintiff's statements. The second plaintiff in the counterclaim had issue with the plaintiff's second statement. Clearly, the underlying fact was identical, namely the posting of and the very fact of the plaintiff's second statement. It quite unmistakably mentioned both the defendant and the second plaintiff. The fundamental question of law common to both plaintiffs and to the plaintiff (in the main action) was

whether the words were defamatory under the law. That much was manifest. Subparagraph (1)(a) was thus satisfied (see paras 57 & 64–66).

(6) There was also no dispute and it is no less incontrovertible that the damages and apology sought by the plaintiffs in their counterclaim against the plaintiff also arose from the same transaction, namely the very same plaintiff's second statement. As such, sub-para (1)(b) was also met. Accordingly, given the conditions in O 15 r 4(1) were determined to have been met, there was no necessity for the second plaintiff to seek the leave of court to join in the proceedings in the counterclaim as a plaintiff since the rule allowed two or more persons to join together in one action as plaintiffs or as defendants (see paras 67–68).

(7) The relief prayed for by the two plaintiffs in the counterclaim for defamation were closely linked to the subject matter of the main defamation suit commenced by the plaintiff. As such, for the same reasons, the learned judge found no good grounds to invoke O 15 r 5 (to which both O 15 rr 2 and 4 are expressly stated to be subject) to order separate trials for the principal and the counterclaim or make any other orders against the counterclaim from being pursued in the manner undertaken by the two plaintiffs (the defendant and the second plaintiff in the counterclaim). It was indeed desirable, if not necessary, for the second plaintiff to be added as a plaintiff in the counterclaim against the plaintiff as the second plaintiff's cause of action was pleaded to be founded on the plaintiff's second statement, which was also one of the two statements which formed the basis of the defendant's cause of action against the plaintiff. On top of all that, these statements of the plaintiff were on the face of the pleadings said to have been related to the earlier allegedly defamatory statements of the defendant towards the plaintiff which gave rise to the principal claim instituted by the plaintiff. The two plaintiffs in the counterclaim plainly shared a common question of law arising from the plaintiff's second statement on for example whether or not the words therein were defamatory, and asked for the relief predicated on the same set of transaction that was also the plaintiff's second statement (see paras 71, 73 & 76).

[Bahasa Malaysia summary

Ini merupakan permohonan plaintif untuk membatalkan tuntutan balas yang dimulakan oleh defendan (sebagai plaintif pertama dalam tuntutan balas) dan seorang lagi sebagai plaintif kedua dalam tuntutan balas yang bukan seorang defendan dalam tuntutan utama. Plaintif telah memulakan satu saman fitnah terhadap defendan sebagai balasan berkaitan dengan beberapa paparan yang dibuat oleh defendan di laman Facebooknya. Defendan menuntut bahawa plaintif telah membuat sejumlah pengataan fitnah, termasuklah antara lain, defendan dua akaun Facebook plaintif sendiri, termasuklah satu tuntutan balas terhadap plaintif dalam pembelaan terpinda. Namun, tuntutan balas tersebut,

bukan sahaja dimulakan oleh defendan pertama sebagai plaintif pertama terhadap plaintif dalam tuntutan utama, dan juga oleh plaintif kedua, seorang peguam-aktivist. Plaintif kedua menyatakan bahawa dalam pengataan yang dikatakan fitnah plaintif terhadap defendan (plaintif pertama dalam tuntutan balas), plaintif juga telah membuat pengataan fitnah terhadap plaintif kedua. Plaintif kemudiannya memohon untuk membatalkan tuntutan balas di bawah A 18 k 19(1)(a), (1)(b) dan (1)(d) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Plaintif menghujahkan bahawa: (a) pengenalan plaintif kedua dalam tuntutan balas adalah cacat dan luar biasa kerana ianya dibuat tanpa izin mahkamah dan defendan oleh yang demikian plaintif kedua dalam tuntutan balas tidak mempunyai locus dalam prosiding; dan (b) hak plaintif untuk menjawab tuntutan balas plaintif kedua adalah terhad kerana dia tidak boleh memasukkan kehadirannya kepada tuntutan balas kerana tiada pengendosan pada Borang 14 yang diperlukan telah difailkan dan diserahkan oleh plaintif kedua dalam tuntutan balas kepada plaintif walaupun keperluan A 15 k 3 KKM 2012. Isu yang timbul untuk ditentukan adalah: (a) sama ada tuntutan balas menunjukan kausa tindakan yang munasabah; (b) sama ada tuntutan balas tersebut adalah remeh, menimbulkan skandal atau merupakan satu salah guna proses; (c) sama ada plaintif kedua boleh terlibat dalam tuntutan balas; (d) sama ada wujud pelanggaran A 15 k 3 KKM 2012; (e) sama ada A 15 k 4 KKM 2012 terpakai; dan (f) sama ada A 15 k 6 KKM 2012 adalah relevan.

Diputuskan, menolak permohonan dengan kos:

(1) Penelitian pliding dalam tuntutan balas dalam kes ini tidak menunjukan kewujudan kausa tindakan munasabah. Untuk membuktikan kausa tindakan dalam saman fitnah, defendan sebagai plaintif perlu membuktikan tiga elemen pada asas plidingnya iaitu yang pertama penelitian penyataan yang menunjukan pengataan fitnah; kedua, pengecaman defendan dalam pengataan tersebut atau yang sama memberi kesan kepada reputasinya;dan ketiga, penerbitan pengataan tersebut kepada pihak ketiga oleh plaintif, mengambilkira keseluruhan pliding dan terutamanya pengataan plaintif pertama dan plaintif kedua. Hakim terpelajar mendapati bahawa elemen yang membentuk kausa tindakan telah dinyatakan di muka pliding dalam tuntutan balas. Sama ada defendan yang mempunyai beban pembuktian boleh dan dapat mengemukakan keterangan memadai untuk membuktikan setiap satu elemen tersebut untuk membuktikan kausa tindakan bukanlah sesuatu yang perlu dipertimbangkan oleh mahkamah pada peringkat ini (lihat perengan 36–37).

(2) Dalam tuntutan, plaintif memohon relif injunksi dan ganti rugi, manakala dalam tuntutan balas plaintif memohon untuk injunksi dan permohonan maaf. Sekali lagi, mengambil kira konteks ianya tidak boleh dikatakan apa yang dinyatakan oleh defendan adalah remeh, menyusahkan dan merupakan satu penyalahgunaan proses. Lanjutan itu,

plaintif dalam pembelaannya kepada tuntutan balas memplidkan bahawa pengataan plaintif pertama dan pengataan plaintif kedua merupakan pengataan yang benar. Ianya adalah untuk pihak-pihak mengemukakan keterangan untuk meyakinkan mahkamah sewaktu perbicaraan penuh, untuk isu sedemikian di peringkat ini hanya akan mewujudkan keterangan afidavit bercanggah, apa lagi, mengambilkira hal perkara dasar, menyebabkan kewujudan isu untuk dibicarakan jelas, oleh yang demikian menyebabkan pembatalan terus tuntutan balas tidak sesuai dan tidak berasas. Ianya tidak boleh ditekankan bahawa semua warganegara malaysia mempunyai hak disisi undang-undang akses kepada keadilan dibawah perkara 5(1) Perlembagaan Persekutuan dan kesan pembatalan pliding adalah untuk menghalang plaintif daripada mendapat harinya di mahkamah (lihat perengan 40–41).

(3) Ianya tidak sukar untuk mengamati bahawa A 15 k 5 tidak terpakai kepada fakta dalam kes ini. Peruntukan tersebut melibatkan defendan dalam tindakan utama yang berniat untuk memfailkan tuntutan balas terhadap plaintif dan seorang lagi yang bukan seorang pihak. Dalam kes ini defendan tidak menyaman melalui tuntutan balas atau apa-apa pihak lain yang merupakan tambahan kepada plaintif. Walhal, di sini, wujud seorang lagi yang bukan spihak dalam tuntutan utama antara plaintif dan defendan dan berniat untuk menjadi pihak dalam tuntutan balas terhadap plaintif. Pihak ini, Siti Zabedah Kasim merupakan plaintif kedua dalam tuntutan balas terhadap plaintif (sebagai defendan), dan defendan merupakan plaintif pertama dalam tuntutan balas (lihat perengan 48).

(4) Asas aduan plaintif berkaitan dengan A 15 k 3 merupakan bahawa dia tidak boleh memasukkan kehadiran kepada tuntutan balas kerana tiada pengendosan telah diserahkan oleh plaintif kedua ataupun sebagai balasan kepadanya, apa-apa kemasukan kehadiran untuk plaintif. Dalam kes ini, plaintif telah memulakan tuntutan utama dan defendan yang perlu untuk memasukkan kehadiran dan membela tindakan. Defendan telah melaksanakan ini dibawah A 12 KKM 2012. Dalam tuntutan balas dimana peranan adalah diterbalikkan, dan plaintif menjadi defendan, wujud tiada keperluan untuk plaintif (sebagai defendan) untuk memasukkan kehadiran. Dengan memulakan tindakan, plaintif telah mengemukakan dirinya kepada bidang kuasa mahkamah dan ianya dianggap bahawa dia akan membela apa-apa tuntutan balas yang difailkan terhadapnya oleh defendan. Dan dia telah berbuat sedemikian. Sekiranya dia berniat untuk tidak mencabar tuntutan balas, dia boleh tidak memfailkan penyataan pembelaannya (lihat perenggan 50 & 53).

(5) Alasan lanjut dan substantif yang memperuntukkan kesahan kepada tuntutan balas yang difailkan oleh plaintif kedua yang dalam kes ini menyertai prosiding hanya diperingkat tuntutan balas, dan bukan

A sebagai seorang defendan yangn dinyatakan dalam A 15 k 3 tetapi sebagai plaintif adalah peruntukan A 15 k 4 berkaitan dengan pencantuman pihak-pihak, berdasarkan fakta kes, ianya sukar untuk menghujahkan menetang kewujudan beberapa persoalan undang-undang yang sama atau fakta dalam terma yang dinyatakan dalam sub-perenggan (1)(a) B A 15 k 4 atau bahawa hak kepada relif oleh plaintif dalam tuntutan balas timbul daripada transaksi yang sama sepertimana yang digambarkan dalam sub-perenggan (1)(b). Tunjang utama perkara berkaitan dengan tuntutan balas adalah bahawa wujud dua pengataan yang menyinggung yang dibuat oleh plaintif. Defendan membantah kepada kedua-dua C pengataan plaintif. Plaintif kedua dalam tuntutan balas mempunyai isu dengan pengataan kedua plainitf. Persoalan undang-undang asas yang sama untuk kedua-dua plaintif dan plaintif (dalam tindakan utama) adalah sama ada perkataan adalah fitnah di sisi undang-undang. Dan ianya adalah jelas. Subperenggan (1)(a) adalah dipenuhi (lihat D perengan 57 & 64–66).

(6) Tiada perbalahan sama dan tidak dinafikan bahawa ganti rugi dan permohonan maaf yang dipohon oleh plaintif dalam tuntutan balas terhadap plaintif juga timbul daripada transaksi yang sama, iaitu E pengataan kedua plaintif. Oleh yang demikian, sub-perenggan 1(b) juga dipenuhi. Oleh itu, mengambilkira pra-syarat A 15 k 4(1) telah dipenuhi, tiada keperluan untuk plaintif kedua untuk memohon izin untuk turut serta dalam prosiding dalam tuntutan balas sebagai plaintif kerana aturan tersebut membenarkan dua atau lebih orang digabungkan F dalam satu tindakan sebagai plaintif atau defendan (lihat perengan 67–68).

(7) Relif yang dipohon oleh dua plaintif dalam tuntutan balas adlaah terikat kepada hal pekara guaman saman fitnah utama yang dimulakan oleh plaintif. Oleh yang demikian, untuk sebab yang sama, hakim bicara tidak G mendapati apa-apa sebab untuk menggunakan A 15 k 5 (yang mana A 15 kk 2 dan 15 dengan jelas menyatakan adalah tertakluk kepada) untuk memerintah perbicaraan berasingan untuk prinsipal dan tuntutan balas atau untuk membuat apa-apa perintah lain terhadap tuntutan balas daripada diteruskan dalam cara yang diambil oleh kedua-dua plaintif dan H kausa tindakan plaintif kedua yang diplidkan berdasarkan pengataan kedua plaintif, yang merupakan salah satu daripada dua pengataan yang membentuk asas kepada kausa tindakan defendan terhadap plaintif, tambahan lagi. Pengataan yang plaintif pada permukaannya plidingn dikatakan berkaitan dengan pengataan yang dikatakan fitnah terdahulu I defendan terhadap plaintif yang menimbulkan tuntutan prisinpal yang dimulakan oleh plaintif. Kedua-dua plaintif secara jelas berkongsi satu soalan undang-undang yang sama yang timbul daripada pengataan plaintif kedua berkaitan sama ada perkataan dalamnya berbaur fitnah, dan memohon untuk relif berdasarkan transaksi yang sama yang juga

merupakan pengataan kedua plaintif (lihat perengan 71, 73 & 76).] A

Cases referred to

Affin Bank Bhd v Eye Bee Sdn Bhd [2005] 7 MLJ 1, HC (refd)
Alloy Consolidated Sdn Bhd & Anor v Anjari Properties Sdn Bhd & Anor [2009] 4 MLJ 833, CA (refd) B
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Boo Are Ngor (claiming as lawful trustee of Kim Leng Tze Temple) v Pentadbir Tanah Daerah Muar & Anor [2009] 9 MLJ 318; [2009] 2 MLRA 579, HC (refd) C
Del E Webb International Hotel Co v Hotel Merlin Penang Sdn Bhd [1973] 1 MLJ 31b; [1972] 1 LNS 28 (refd)
Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ 192, CA (refd)
Horwood v Statesman Publishing Co, Ltd and Others Childs v Same [1929] All ER Rep 554; (1929) 98 LJKB 450, CA (refd) D
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
Lembaga Arkitek Malaysia v Cheah Kim Fah & Ors [1999] 1 MLJ 669; [1999] 2 CLJ 937, CA (refd) E
Letang v Cooper [1965] 1 QB 232, CA (refd)
Malayan Banking Bhd & Anor v Swasta Jaya Sdn Bhd [1990] 2 MLJ 12, SC (refd)
Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd [2013] 4 MLJ 520, CA (refd) F
Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309, CA (refd)
Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157; [1985] CLJ 242, FC (refd) G
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)
Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and another [1970] AC 1136, PC (refd)
S Constantine v Social Security Organization (SOCSO) & Anor [1998] 1 MLJ 160; [1998] 1 CLJ 433, CA (refd) H
See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235; [2013] 3 AMR 385, CA (refd)
Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 5 MLRA 175, FC (refd) I
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)
Sundram v Arujunan & Anor [1994] 3 MLJ 361, SC (refd)
Tony Pua Kiam Wee v Government of Malaysia and another appeal [2019] 12

MLJ 1; [2020] 1 CLJ 337, FC (folld)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1, PC (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661; [1996] 1 CLJ 393, CA (refd)
Zaina Abidin bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors [2009] 6 MLJ 863, CA (refd)

Legislation referred to

Federal Constitution art 5(1)
Rules of Court 2012 O 12, O 15, O 15 rr 2, 3, 4, 4(1), (1)(a), (1)(b), 5, 6(2)(b), O 18 rr 19, 19(1), (1)(a), (1)(b), (1)(d), (2), O 92 r 4, Form 14

Sharul Shabaath Ali (Syahidah Sharul & Marsyara) for the plaintiff.
Rajesh Nagarajan (Pavitra Loganathan with him) (Raj & Sach) for the first defendant.

Mohd Nazlan J:

INTRODUCTION

[1] This was an application by the plaintiff to strike out the counterclaim instituted by the defendant (as the first plaintiff in the counterclaim) and another person as the second plaintiff in the counterclaim who was not a defendant in the main claim.

[2] At the conclusion of the hearing which was conducted via Zoom remote communication technology, I dismissed the application and provided the principal grounds for the same. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[3] This is a defamation action. The plaintiff, a Muslim preacher, a chief executive of an association named One Centre Malaysia instituted a writ action in response to a number of postings made by the defendant, who is involved in a Hindu organisation (Persatuan Hindu Agamam Ani Malaysia) on the latter's Facebook page which the plaintiff alleged contain defamatory statements against him, as pleaded in his statement of claim.

[4] In his amended defence to the plaintiff's claim, the defendant, who claimed that the plaintiff had subsequently himself made a number of defamatory statements concerning, among others, the defendant in the plaintiff's own Facebook account, also included a counterclaim against the plaintiff.

[5] This counterclaim however is not only instituted by the defendant as the first plaintiff against the plaintiff in the main claim, but also by a second plaintiff, a lawyer-activist. The latter alleged that in one of his alleged defamatory statements against the defendant (the first plaintiff in counterclaim), the plaintiff had also libelled the second plaintiff.

[6] For primarily the said reason, the plaintiff filed this instant striking out application.

ESSENCE OF CONTENTIONS BY LITIGANTS

[7] The plaintiff submitted that the introduction of the second plaintiff in the counterclaim was defective because it made without leave of this court, and without sufficient particularisation of the relevance of her involvement in the dispute between the plaintiff and the defendant. The second plaintiff, according to the plaintiff simply had no locus in these proceedings.

[8] It was also contended that the plaintiff's right to answer the second plaintiff's counterclaim was restricted as he was not able to enter his appearance to the counterclaim since no endorsement in the requisite Form 14 had been filed and served by the second plaintiff on the plaintiff despite the requirement of O 15 r 3 of the Rules of Court 2012 ('the RC 2012').

[9] The counterclaim was thus argued by the plaintiff to have been instituted in a very irregular fashion, justifying the same to be struck out under O 18 r 19(1)(a), (1)(b) and (1)(d) of the RC 2012.

[10] The defendant in response resisted this striking out application, asserting that the counterclaim did not fail to disclose a reasonable cause of action, and was neither frivolous nor vexatious, as well as not an abuse of process, since the inclusion of the second plaintiff was permitted under O 15 r 4 of the RC 2012.

[11] Before I proceed to examine the issues, it is useful that the law on striking out be stated, albeit in summary fashion.

THE LAW ON STRIKING OUT — A SUMMARY

[12] The starting point of reference must be O 18 r 19(1) of the RC 2012 which relevant provisions read as follows:

> 19 Striking out pleadings and endorsements (O 18 r 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in

A any pleading or in the endorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

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(d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a) ...

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[13] The plaintiff premised his applications on limbs (a), (b) and (d). Thus it was stated that the counterclaim by the defendant (and second plaintiff in that counterclaim) disclosed no reasonable cause of action, was frivolous, vexatious and otherwise tantamount to an abuse of court process.

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[14] The leading authority on O 18 r 19(1) is the Supreme Court decision in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, and in particular, the following part of the judgment of Mohamed Dzaiddin SCJ (later Chief Justice):

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> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 Rules of the High Court) (*Hubbuck v Wilkinson*)). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

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[15] It is therefore well established that the power of the court to strike out under the four grounds of O 18 r 19(1) is to be exercised when it can clearly be determined that a claim or answer is prime facie obviously unsustainable (see also the Court of Appeal decision of *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520). It is also only to be invoked sparingly (see *Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1).

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[16] It is also well settled that as for limb (a), and as stated in O 18 r 19(2) above, examination could only be made of the pleadings, not the affidavits

evidence, but where the application is premised on more than one ground under O 18 r 19(1), like in the present case, the court should ignore the affidavits affirmed in relation to the other grounds when dealing with limb (a) which ought to be considered first, before examining the affidavit evidence under the other limbs (see *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2013] 3 AMR 385).

[17] The court is as such permitted, in an application other than under limb (a) (on the ground of no reasonable cause of action) to examine the affidavit evidence instead of merely the pleadings in the statement of claim of the plaintiff (see *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309), and where necessary scrutinise them with a fine tooth comb (see *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1).

[18] The court is as such perfectly entitled to examine the law and available evidence in detail to ascertain whether a striking out is warranted (see *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 and *Zaina Abidin bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors* [2009] 6 MLJ 863).

[19] It could also be said that as for limb (b), the test is the same consideration on the claim being obviously unsustainable and that for limb (d), it arises when the process of the court is not used in a bona fide manner and has been abused (see the Court of Appeal decision in *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192) and the said claim must also be proven to be obviously unsustainable (see another Court of Appeal decision of *Zainal Abidin bin Hamid @ S. Maniam v Kerajaan Malaysia* [2009] 6 MLJ 863).

[20] It is equally clear as it is practical that the situations that could fall within the categories under limb (d) are never closed given the variety of circumstances arising from the facts of each particular case. The categories of cases where the process of the court could be abused are varied as they are numerous. They are non-exhaustive (see *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637).

[21] And, as established by the Supreme Court in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16, the courts have the inherent jurisdiction to prevent an abuse of its process.

[22] For completeness, I should add that a strike out request under O 92 r 4 on the inherent jurisdiction of the court on the ground of abuse of process can also be justified on considerations of public policy and interest of justice (see

the Federal Court decision in *Boo Are Ngor (claiming as lawful trustee of Kim Leng Tze Temple) v Pentadbir Tanah Daerah Muar & Anor* [2009] 9 MLJ 318; [2009] 2 MLRA 579).

EVALUATION AND FINDINGS OF THIS COURT

The alleged defamatory statements

[23] It is I think apposite, given the basis of this striking out application, that the alleged defamatory statements as pleaded by the parties be reproduced as far as relevant for present purposes.

[24] First, the statements attributed to the defendant that the plaintiff pleaded in his statement of claim as being defamatory towards the plaintiff, are as follows:

> Amma good piece ... Zamri Vinoth this is the lowest point one can go ... but that what can we expect from a person rape and later got married to the victim...in Zakir Naik's book this is good not by the standards of human ...
>
> Arrest Zamri Vinoth
>
> Arun Dorasamy

('the defendant's first statement').

[25] It is observed that the defendant first's statement, which was said to have been made on 26 April 2019 at 8.37pm, was accompanied with a video of a Hindu lady who said that the plaintiff had humiliated and insulted the Hindu religion, that he should not disturb Waytha Moorthy a/l Ponnusamy, and that she also invited the plaintiff to debate with her.

[26] Then, another allegedly defamatory posting towards the plaintiff was made by the defendant on 4 May 2019 at 11.23pm, as follows:

> Even a rapist never admit his guilt and started to blame others. So where's the difference with a guy that travelled from Hindu to Christianity to Islam. From Rahang to Arau ... from assault, rape and CBT to dakwah and what again?

('the defendant's second statement').

[27] The counterclaim by the defendant (and the second plaintiff) in turn, was in response to two alleged defamatory statements made by the plaintiff on his Facebook. The first, made on 5 June 2020 at 6.52pm reads as follows:

> ... Kamu pula marah bila orang jadi pandai kenapa? Takkan kamu nak semua orang kekal bodoh dengan menyembah batu seperti kamu?

('the plaintiff's first statement').

[28] The second statement, said to have been posted on 10 June 2020 at 7.37pm is as follows:

> ... Waytha, Ramasamy, Arunakiri Nathan, Arun Doraisamy, Siti Kasim ni adalah antara dari nama yang seringkali menentang dan memusuhi Islam ...

('the plaintiff's second statement').

Whether the counterclaim disclosed a reasonable cause of action

[29] The key point is and as well established by the aforesaid various case law authorities, as long as the counterclaim discloses some cause of action or raises some questions to be tried then the claim should not be struck out. And in all situations, a claim should only be struck out under O 18 r 19 if it is plainly and obviously unsustainable, and that even a claim which is considered weak or unable to succeed at trial should not without more be a ground to be struck out.

[30] As for item (a) under O 18 r 19(1) concerning the contention of the plaintiff that the counterclaim did not disclose a reasonable cause of action, a review of the pleadings (and not the affidavits) is necessary to determine if they disclose a reasonable cause of action.

[31] In this respect, the following observation by Nallini Pathmanathan FCJ in *Tony Pua Kiam Wee v Government of Malaysia and another appeal* [2019] 12 MLJ 1; [2020] 1 CLJ 337 is especially instructive:

> [38] With the greatest respect, the Court of Appeal in the instant appeals appears to have conflated and misapplied the principle that there ought to be no trial by affidavit with the need to examine and ascertain that there is a proper cause of action made out which can proceed to trial. The essence of a striking out application particularly under limb (a) of O 18 r 19(1) is that upon an examination of the claim as pleaded in the statement of claim, a whole and coherent cause of action must subsist. A whole and coherent cause of action cannot subsist until and unless all the essential ingredients comprising that cause of action subsist or are made out in the body of the statement of claim. That, in turn, means that it is incumbent upon a court undertaking a striking out exercise to scrutinise a claim purposively such that it is satisfied that prima facie, the statement of claim contains a sufficient factual matrix to support each and every ingredient of the cause of action pleaded. The issue of whether or not such a factual matrix is capable of proof is a matter of evidence which must, necessarily, be dealt with by way of oral evidence at trial. However this latter issue is wholly separate and disparate from whether or not the ingredients of a particular cause of action have been made out.

[32] What is a cause of action? It has long been settled that as held in *Letang v Cooper* [1965] 1 QB 232 that a reasonable cause of action involves a factual situation the existence of which entitles a party to obtain a remedy against another party from the court. In that case, where a car driven by the defendant

reversed over the legs of the plaintiff who was sunbathing on a piece of grass in a parking area, the English Court of Appeal in the judgment written by Diplock LJ decided that where the damage was caused by an action which was not intentional, an action for the trespass to the person could not be pursued, but should instead have been commenced under the tort of negligence (which was however by then time-barred).

[33] In *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661; [1996] 1 CLJ 393 'cause of action' was explained in the following fashion:

> With respect, I think we should first ask ourselves what a 'cause of action' is? *Stroud's Judicial Dictionary* (5th Ed) Vol 1 p 378 gives twenty separate interpretations of this expression. I think the first is appropriate:
>
> > A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher MR, *Read v Brown*, 22 QBD 128; this case was applied in *Bennett v White* [1910] 2 KB 643).

[34] In a majority judgment of the Privy Council delivered by Lord Diplock, a 'cause of action' has been defined in *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and another* [1970] AC 1136 as state of facts the existence of which entitles the court to grant to the plaintiff the relief applied for in the action.

[35] And importantly, in order to determine whether a reasonable cause of action exists, the court must assume the truth of the primary facts alleged by the defendant in the counterclaim. In *Tuan Haji Ishak bin Ismail*, Mahadev Shankar JCA stated:

> ... But O 18 r 19(1)(a) only requires that the court assume the truth of the 'primary facts' alleged. It does not require that the petitioner's inferences from those facts should also be assumed to be true, unless those inferences necessarily follow. Nor is the court obliged to accept the 'conclusions' alleged or the relief sought unless the factual basis for those conclusions or relief have been pleaded ...

[36] In my judgment, a scrutiny of the pleadings in the counterclaim in this case cannot but readily disclose the existence of a reasonable cause of action. In order to establish a cause of action in defamation, the three elements that the defendant, as the plaintiff in the counterclaim must be able to show on the face of his pleadings are that first, a specification of a statement bearing defamatory imputations; secondly, the identification of the defendant in the statement or that the same reflects on his reputation; and thirdly, the publication of the statement to any third person by the plaintiff.

[37] Having regard to the entirety of the pleadings and particularly the plaintiff's first statement and the plaintiff's second statement, I find that these elements constituting the cause of action in defamation have been disclosed on the face of the pleadings in the counterclaim. Whether the defendant who bears the burden of proof has and can adduce sufficient evidence to prove each and every of the said elements to establish the cause of action is not the concern of the court at this stage.

Whether the counterclaim is vexatious, scandalous and an abuse of process

[38] Similarly even when regard be had to the affidavit evidence filed in this application in respect of the grounds to strike out the counterclaim under items (b) and (d) of O 18 r 19(1) concerning the said pleadings being said by the plaintiff to be vexatious and frivolous and that it is an abuse of process, I find it difficult to fathom how this could be the case. Not to mention that the counterclaim can hardly be construed as a claim which is obviously unsustainable. Very far from it.

[39] Here the litigants appear to be making statements said to be directed against, among others, one another which are laced with religious sensitivities. On the facts as pleaded, the defendant first made the postings (the defendant's first statement and the defendant's second statement) which the plaintiff took exception of, which led to the filing of the main claim, but it seems that the plaintiff also subsequently made his own postings (the plaintiff's first statement and the plaintiff's second statement) which contained statements also allegedly defamatory, this time towards the defendant.

[40] In his claim, the plaintiff seeks the reliefs of primarily injunction and damages, whilst in the counterclaim, the defendant prays mainly for injunction and an apology. Again given the context it cannot be said what the defendant is seeking is frivolous, vexatious or abusive of the process. Further, the plaintiff in his defence to the counterclaim has pleaded that the plaintiff's first statement and the plaintiff's second statement were statements of truth. it is for the parties to adduce evidence to convince the court in a full trial, for such issues would at this stage only generate conflicting affidavit evidence, what more considering the underlying subject matter, making the existence of triable issues demonstrably manifest, thus rendering summary dismissal of the counterclaim plainly unsuited and wholly unjustified.

[41] For it also cannot be emphasised enough that every Malaysian citizen has a constitutional right of access to justice under art 5(1) of our Federal Constitution (see the Federal Court case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507), and the effect of striking out a pleading is to completely deprive a plaintiff from having his day

in court (see another decision of the Federal Court, in *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1; [2013] 5 MLRA 175).

The issue of the inclusion of another plaintiff in the counterclaim

[42] The one argument of the plaintiff that appears at first blush to have some merits is on the validity of the inclusion of the second plaintiff in the counterclaim. The plaintiff, as mentioned earlier, said it has not been established how the second plaintiff is connected to the plaintiff's second statement.

[43] However, I find this tenuous. Even though it is true that the second plaintiff did not specifically state the nexus between her and the plaintiff's second statement, it is very clear that she was named in the plaintiff's second statement, as I have referred to earlier.

[44] The plaintiff appears to make an issue out of the fact that the second plaintiff named herself as Siti Zabedah bt Kasim whilst the plaintiff's second statement refers to one Siti Kasim. However there is in my view neither a doubt nor confusion from the face of the pleadings in the counterclaim that Siti Zabedah bt Kasim is Siti Kasim.

[45] More importantly, in his own defence to the counterclaim the plaintiff himself pleaded, to refer only to one example, in para 36 therein that the plaintiff's second statement was also in response to the publications by way of postings uploaded on the Facebook account of Siti Zabedah bt Kasim in the name of 'Siti Kasim'. Further, in particularising his defence of justification the plaintiff stated among others that:

> Siti Zabedah binti Kasim sememangnya sering bersuara dan membuat penerbitan dan/atau muat naik penyataan yang menentang agama Islam di muka buku Siti Zabedah sendiri, iaitu Siti Kasim.

Whether there is infringement of O 15 r 3 of the RC 2012

[46] The more substantive contention of the plaintiff is on the fact that the introduction of the second plaintiff in the counterclaim was irregular as it was made without leave of Court and that this justified the counterclaim to be struck out.

[47] First, the plaintiff argued that the counterclaim infringes O 15 r 3 of the RC. Order 15 reads as follows:

> 15 Causes of action, counterclaims and parties
>
> 3 Counterclaim against additional parties (O 15 r 3)

(1) Where a defendant to an action who makes a counterclaim against the plaintiff alleges that any other person (whether or not a party to the action) is liable to him along with the plaintiff in respect of the subject matter of the counterclaim, or claims against such other person any relief relating to or connected with the original subject matter of the action, then, subject to rule 5(2), he may join that other person as a party against whom the counterclaim is made.

(2) Where a defendant joins a person as a party against whom he makes a counterclaim, he shall add that person's name to the title of the action and serve on him a copy of the counterclaim; and a person on whom a copy of a counterclaim is served under this paragraph shall, if he is not already a party to the action, become a party to it as from the time of service with the same rights in respect of his defence to the counterclaim and otherwise as if he had been sued in the ordinary way by the party making the counterclaim.

(3) A defendant who is required by paragraph (2) to serve a copy of the counterclaim made by him on any person who before service is already a party to the action shall do so within the period within which, in accordance with Order 18, rule 2, he must serve on the plaintiff the defence to which the counterclaim is added.

(4) Where in accordance with paragraph (2) a copy of a counterclaim is required to be served on a person who is not already a party to the action, Order 10 (except rule 1(4)), Orders 11 to 13 and Order 70, rule 3, shall, subject to paragraph (3), apply in relation to the counterclaim and the proceedings arising from it as if —

(a) the counterclaim were a writ and the proceedings arising from it an action; and

(b) the party making the counterclaim is a plaintiff and the party against whom it is made a defendant in that action.

(5) A copy of a counterclaim required to be served on a person who is not already a party to the action shall be endorsed with a notice, in Form 14, addressed to that person —

(a) stating the effect of Order 12, rule 1, as applied by paragraph (4); and

(b) stating that he may enter an appearance in Form 15 and explaining how he may do so.

[48] It is not difficult to appreciate that O 15 r 3 does not apply to the facts in the instant case. This provision concerns a defendant in a main action who wishes to file a counterclaim against the plaintiff and another person who is not already a party. In the instant case the defendant is not suing by way of counterclaim any other party in addition to the plaintiff. In fact here, there is another person who was not already a party in the main claim between the plaintiff and the defendant who wished to be a party in the counterclaim against the plaintiff. This party, Siti Zabedah Kasim is the second plaintiff in the counterclaim against the plaintiff (as the defendant), and the defendant is the first plaintiff in the counterclaim.

[49] The crux of the plaintiff's grievance, as mentioned earlier, is the argument that there was non-compliance with O 15 r 3, in that the plaintiff's right to answer the second plaintiff's counterclaim was restricted as he was not able to enter his appearance to the counterclaim since no endorsement in the requisite Form 14 had been filed and served by the second plaintiff on the plaintiff despite the requirement of O 15 r 3.

[50] As has been clearly established, O 15 r 3 has no application to this case. So that puts paid to the argument of the plaintiff. Notwithstanding, the essence of the complaint of the plaintiff in respect of O 15 r 3 is his inability to enter appearance to the counterclaim as no endorsement had been served by the second plaintiff on him. But this is patently misconceived, for there is no requirement for any endorsement be served by the second plaintiff nor in response thereto, any appearance by the plaintiff.

[51] Now, it is trite that the process on the entry of appearance by a defendant, such as primarily contained in O 12 of the RC 2012, and also in O 15 r 3 on counterclaims, signifies two important consequences. By entering appearance, a defendant named in a writ action not only acknowledges to the plaintiff and to the court his intention to defend the suit, but also at the same time submits to the jurisdiction of the court.

[52] In *Malayan Banking Bhd & Anor v Swasta Jaya Sdn Bhd* [1990] 2 MLJ 12 Lee Hun Hoe CJ (Borneo) for the Supreme Court succinctly observed as follows:

> Appearance is a very important process by which a defendant shows his intention to defend and submits himself to the jurisdiction of the court.

[53] In this case the plaintiff initiated the main claim and it was the defendant who had to enter appearance and defend the action. This the defendant has performed under O 12. In the counterclaim where their roles are reversed, and the plaintiff becomes the defendant, there is however no necessity for the plaintiff (as defendant) to enter appearance. By initiating the suit, the plaintiff has already submitted himself to the jurisdiction of the court and it is assumed that he would defend any counterclaim filed against him by the defendant. And indeed he has. If he had wished not to contest the counterclaim, he could have easily not filed his defence statement.

[54] For the same reason, Siti Zabedah bt Kasim, as the second plaintiff in the counterclaim, has chosen to initiate a counterclaim with the defendant against the plaintiff. A plaintiff does not need to enter appearance. And neither, as just stated, does the plaintiff as the defendant in the counterclaim have to enter appearance. The plaintiff, despite being a defendant in the counterclaim is after all already a party to the suit initiated by him.

[55] At the risk of repetition, the requirement under O 15 r 3 for a notice to be endorsed on a counterclaim is only applicable to a situation where the defendant in the main suit seeks to sue a party who is not the plaintiff in the main action. It is for that other party, upon receipt of service of the duly endorsed counterclaim to enter appearance if he wishes to defend the same and avoid a judgment in default be entered against him. In the instant case, Siti Zabedah bt Kasim is not a defendant in any claim. She is a plaintiff (the second plaintiff) in the counterclaim against the plaintiff.

[56] As such the argument of the plaintiff which seeks to strike out the counterclaim filed by the defendant and the second plaintiff on account of a non-conformity with O 15 is wholly unmeritorious.

Whether O 15 r 4 is applicable

[57] A further and substantive basis which provides validity to the counterclaim filed by the second plaintiff who in this case joins the proceedings only at that stage in a counterclaim, not as a defendant as contemplated in O 15 r 3 but instead as a plaintiff is the provisions of O 15 r 4 on joinder of parties.

[58] The requirements of O 15 r 4 state as follow:

> 4 Joinder of parties (O 15 r 4)
>
> (1) Subject to rule 5(1), *two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where-*
>
> (a) *if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and*
>
> (b) *all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.*
>
> (2) Where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled shall, subject to the provisions of any written law and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff shall, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant. This paragraph does not apply to a probate action.
>
> (3) Where relief is claimed in an action against a defendant who is jointly liable with some other person and also severally liable, that other person need not be made a defendant to the action; but where persons are jointly, but not severally, liable under a contract and relief is claimed against some but not all of those persons in an action in respect of that contract, the Court may, on the application of any defendant to the action, by order stay the proceedings in the action until the other persons so liable are added as defendants. (Emphasis added.)

[59] The first point of note is that this provision permits a joinder of parties as of right, subject to the fulfilment of the conditions stated in sub-paras (1)(a) and (b). And if they are not, a joinder may still be allowed if leave of court is obtained.

[60] On the latter, as was made clear by NH Chan JCA in *S Constantine v Social Security Organization (SOCSO) & Anor* [1998] 1 MLJ 160; [1998] 1 CLJ 433, leave of court is only necessary if the conditions are not met, in the following terms:

> As can be seen, the appellant has joined the two respondents together in the same action as defendants without obtaining the leave of the court. Under O 15 r 4(1), leave of the High Court is required if there is no common question of law or fact involved in the two actions (r 4(1)(a)) and the rights to the relief claimed in the statement of claim against each of the respondents are not concerned with the same transaction or series of transactions (r 4(1)(b)). Here, the appellant's claim against SOCSO is for a declaration that he is entitled to receive invalidity pension under s 17 of the Employees Social Security Act 1969, whereas, in his claim against his employer, the second respondent, it is for damages or reinstatement for wrongful dismissal. Both these claims are quite unrelated to each other with no common question of law or fact involved.

[61] The second point that should be highlighted is that this rule is intended to be interpreted purposively and widely in order to ensure that all relevant parties are before the court to enable all issues in dispute amongst them to be properly adjudicated and determined in the same proceedings. In *Del E Webb International Hotel Co v Hotel Merlin Penang Sdn Bhd* [1973] 1 MLJ 31b; [1972] 1 LNS 28 Chang Min Tat J (as he then was) approved of the following proposition as earlier enunciated by Scrutton LJ in *Horwood v Statesman Publishing Co, Ltd and Others Childs v Same* [1929] All ER Rep 554; (1929) 98 LJKB 450 as follows:

> The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the Court, If such inclusion is embarrassing, to strike out one or more of the parties. It is impossible to lay down any rule as to how the discretion of the Court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact, bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

[62] After all it is also well-established that a non-joinder of a party gives rise of violation of basic natural justice if the decision is intended to bind the party. In a majority decision of the Supreme Court in *Sundram v Arujunan &*

Anor [1994] 3 MLJ 361 Edgar Joseph Jr SCJ stated thus:

> In our view, it was neither right nor fair to find that the plaintiff's head injury had been caused as a result of the prior collision involving the plaintiff's motor cycle and the other motor cycle, without hearing the rider of the other motor cycle. Indeed, as we have mentioned, at the outset, he was never cited as a party in the suit or even called as a witness, and no explanation had been vouchsafed to the trial court for this glaring omission. There was, therefore, a clear breach of the rule of natural justice embodied in the maxim 'audi alteram partem', when the trial judge had found that the plaintiff's head injury was the direct result of the prior collision with the other motor cycle, considering that the other motor cyclist never had the opportunity of being heard.

[63] The third consideration is that the application of O 15 r 4 is also expressly stated to be subject to O 15 r 5 which provides that the court may order separate trials or make such other order as may be expedient if it appears to the court that the joinder of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient. In addition the court may order a counterclaim to be struck out or may order it to be tried separately, if it appears on the application of any party against whom a counterclaim is made that the subject matter of the counterclaim ought for any reason to be disposed of by a separate action.

[64] On the facts of the instant case, it is difficult to argue against the existence of some common question of law or fact in terms envisaged under sub-para (1)(a) of O 15 r 4 or that the rights to relief by the plaintiffs in the counterclaim arise out of the same transaction as contemplated under sub-para (1)(b).

[65] After all, the crux of the matter in respect of the counterclaim is that there are two allegedly offending statements made by the plaintiff. The plaintiff's first atatement and the plaintiff's second statement. The defendant took objection to both these statements. The second plaintiff had issue with the plaintiff's second statement.

[66] The plaintiff's second statement as mentioned earlier refers to a posting made by the plaintiff which is alleged to be defamatory towards those named therein, including in this case, the defendant and the second plaintiff. Clearly the underlying fact is identical, namely the posting of and the very fact of the plaintiff's second statement. It quite unmistakably mentions both the defendant and the second plaintiff. The fundamental question of law common to both plaintiffs and to the plaintiff (in the main action) is whether the words are defamatory under the law. That much is manifest. Subparagraph (1)(a) is thus satisfied.

[67] There is also no dispute and it is no less incontrovertible that the damages and apology sought by the plaintiffs in their counterclaim against the plaintiff also arises from the same transaction, namely the very same plaintiff's second statement. As such, sub-para (1)(b) is also met.

[68] Accordingly, given the conditions in O 15 r 4(1) are determined to have been met, there is no necessity for the second plaintiff to seek the leave of court to join in the proceedings in the counterclaim as a plaintiff since the rule allows two or more persons to join together in one action as plaintiffs or as defendants.

[69] It hardly needs reminding that a counterclaim is an independent action against a plaintiff (see *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157; [1985] CLJ 242) and under O 15 r 2 may be filed against a plaintiff by a defendant in the same action in respect of any matter howsoever arising. In the instant case however, the postings by the plaintiff as manifested in the plaintiff's first statement and the plaintiff's second statement which triggered the counterclaim appear on the face of the pleadings to have some semblance of relevancy to the earlier postings made by the defendant in the defendant's first statement and the defendant's second statement which gave rise to the main claim initiated by the plaintiff in the first place.

Relevance of O 15 r 6

[70] Quite apart from having regard to O 15 r 6 which operates to save any misjoinder or non-joinder of parties, I also do not consider the counterclaim in this case to offend the principle expressed in authorities such as the Court of Appeal decision in *Alloy Consolidated Sdn Bhd & Anor v Anjari Properties Sdn Bhd & Anor* [2009] 4 MLJ 833 that a counterclaim cannot be maintained unless it is demonstrated that the relief claimed holds a sufficient nexus with the subject matter of the principal claim to justify that both claim and counterclaim ought in the interest of justice to be dealt with together in a single proceedings.

[71] As stated earlier the relief prayed for by the two plaintiffs in the counterclaim for defamation are closely linked to the subject matter of the main defamation suit commenced by the plaintiff. As such, for the same reasons I find no good grounds to invoke O 15 r 5 (to which both O 15 r 2 and O 15 r 4 are expressly stated to be subject) to order separate trials for the principal and the counterclaim or make any other orders against the counterclaim from being pursued in the manner now undertaken by the two plaintiffs (the defendant and the second plaintiff in the counterclaim).

[72] Indeed on misjoinder and non-joinder of parties, O 15 r 6(2)(b) also expressly empowers the court to do the following:

(2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application —

...

(b) order any of the following persons to be added as a party, namely —

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

[73] It is indeed desirable, if not necessary, for the second plaintiff to be added as a plaintiff in the counterclaim against the plaintiff as the second plaintiff's cause of action is pleaded to be founded on the plaintiff's second statement, which is also one of the two statements which form the basis of the defendant's cause of action against the plaintiff. On top of all that, these statements of the plaintiff are on the face of the pleadings said to have been related to the earlier allegedly defamatory statements of the defendant towards the plaintiff which gave rise to the principal claim instituted by the plaintiff.

[74] A reference to a decision on this subject is useful. In *Lembaga Arkitek Malaysia v Cheah Kim Fah & Ors* [1999] 1 MLJ 669; [1999] 2 CLJ 937 the appellant's contention was that there was a procedural flaw in the action as the respondents were not entitled to bring the action jointly because even though there was a common question of law between the parties, the reliefs claimed in the action did not arise out of the same transaction or series of transactions. It was also contended that the appellant had pointed out that each respondent had a separate cause of action based on a factually different background.

[75] Abdul Malek Ahmad JCA (as he then was) explained the position in the following terms:

The learned trial judge referred to O 15 r 4 of the Rules of High Court 1980 (hereinafter 'the Rules') which reads as follows:

...

The learned trial judge added that it must be emphasised that the joinder of plaintiffs or defendants is subject to two conditions namely that the right of relief must in each case be in respect of or arise out of the same transaction or series of transactions, and there must be some common question of law or fact.

A He concluded that it is abundantly clear that the respondents, who are the plaintiffs in this particular instance, did share a common question of law as to the reliefs claimed by them, mainly for a declaration that they are entitled to submit plans to the local authorities from whom they had obtained the relevant approvals, which have so far been denied to them over a period of time by the appellant, the defendant in the court below. It would from the evidence, he held, fall within the purview of a series of transactions for the purposes of O 15 r 4(1) (b) of the Rules. Even if he was held to be wrong on the law in respect of O 15 r 4 of the Rules, he added, O 15 r 6 of the Rules explicitly states that no suit shall be defeated by reason of a misjoinder. We were in no position to disagree with the learned trial judge on this issue and similarly hold that the issue of misjoinder raised by the appellant here is completely without basis.

[76] It needs no reiteration that in the instant case now before me, the two plaintiffs in the counterclaim plainly share a common question of law arising from the plaintiff's second statement on for example whether or not the words therein are defamatory, and ask for the relief predicated on the same set of transaction that was also the plaintiff's second statement.

CONCLUSION

[77] In view of the foregoing reasons, I find that the plaintiff has not succeeded on a balance of probabilities to establish his case for the striking out of the counterclaim by the defendant and the second plaintiff (in the counterclaim) under O 18 r 19(1). The application is therefore dismissed with costs.

Application dismissed with costs.

Reported by Michelle Yee